

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-5019

77-5022

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

In the Matter of
STIRLING HOMEX CORPORATION,

Debtor.

**GREGORY JEZARIAN, GERALDINE JEZARIAN,
LONETOWN COMPANY, HARRY E. JONES, ALECK
GOLDBERG, as Custodian for Mark Goldberg and Mrs. D.
WINDSOR DIXON,**

Appellants,

**FRANK G. RAICHLE, Reorganization Trustee; LINCOLN
FIRST BANK OF ROCHESTER; CHEMICAL BANK;
THE CHASE MANHATTAN BANK, N.A.; THE FIRST
NATIONAL BANK OF CHICAGO; MARINE MIDLAND
BANK; and THE TRAVELERS INDEMNITY COMPANY,**

Appellees.

Appeal From the United States District Court For The
Western District Of New York

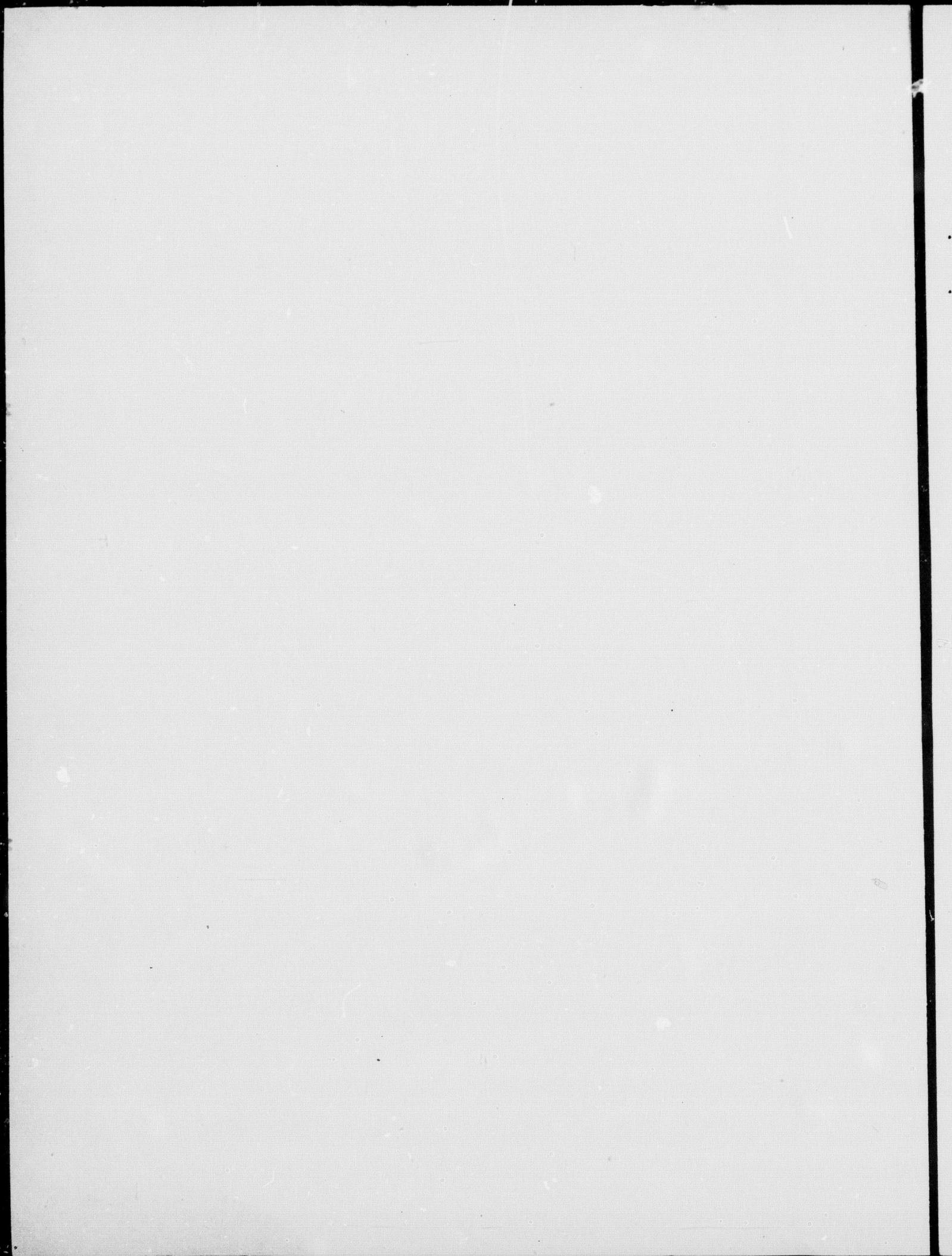
**BRIEF FOR APPELLEES
MARINE MIDLAND BANK AND
LINCOLN FIRST BANK OF ROCHESTER**

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CONSOLIDATED APPEALS:
77-5019, 77-5022

UNITED STATES COURT OF APPEALS

For the Second Circuit

In the Matter of

STIRLING HOMEX CORPORATION, Debtor

GREGORY JEZARIAN, GERALDINE JEZARIAN, LONETOWN
COMPANY, HARRY E. JONES, ALECK GOLDBERG, as
Custodian for Mark Goldberg, and
MRS. D. WINDSOR DIXON,

Appellants,

FRANK G. RAICHLE, Reorganization Trustee; LINCOLN
FIRST BANK OF ROCHESTER; CHEMICAL BANK; THE CHASE
MANHATTAN BANK, N.A.; THE FIRST NATIONAL BANK OF
CHICAGO; MARINE MIDLAND BANK; and THE TRAVELERS
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BRIEF FOR APPELLEES
MARINE MIDLAND BANK AND
LINCOLN FIRST BANK OF ROCHESTER

For the reasons given and on the author-
ities cited in the Brief for Appellee, Frank G.
Raichle, Reorganization Trustee and the Brief for

Appellees, Chemical Bank and The First National Bank of Chicago, the order under review should be in all respects affirmed.

We wish to underscore that there are forceful arguments that Appellants lack standing before this Court. The Jezarians, Dixon and Lonetown Company did not file a proof of claim within the time provided by the District Court and their claims are therefore barred. The bar order of December 11, 1972 was proper, unambiguous and enforceable and it was properly and timely served upon the Appellants. While Jones and Goldberg filed claims, they did not contest the issue decided by the District Court at the hearing of June 13, 1977 -- they did not appear.

If the Court reaches the issues presented in Points I-III of Appellants' Brief, we emphasize the following:

1. The District Court properly directed, in the exercise of its discretion, that the claims of so-called defrauded stockholders be classified as subordinate to the claims of conventional general creditors. (a) This result was compelled by the absolute priority rule. (b) Such claims were

properly subordinated since they were contingent and unliquidated. (c) The determination is in accordance with the diverse investment expectations of stockholders as opposed to general creditors. (d) The determination is supported by applicable authorities. (e) Stockholders have alternative remedies available to them to redress their alleged grievance.

2. Appellants' argument in Point II that the banks did not rely on the capital contributions of the so-called defrauded stockholders was not made below and therefore should not be available to them here. In any event the argument wholly overlooks the nature of a corporation's relationships to its shareholders and creditors. The stock of a corporation does not merely represent its ownership. It is a substitute for the personal liability that exists in the case of an unincorporated business -- a fund for the payment of its debts. Logically, it follows that anyone loaning money to a corporation does so in reliance upon the protection and security which the money invested by the shareholders affords. The matter, however, need not be left there. It is carefully analyzed at pages 25-27

of the Trustee's brief. The suggestion that the banks would extend credit to Homex regardless of the outcome of the preferred stock offering is wholly unsupported -- (1) the record references to July, 1971 statements by a representative of Chemical Bank do not even substantiate such a claim as against Chemical and (2) they indicate nothing with respect to the other banks. The credit agreement with Homex under which Chemical was agent was dated January 24, 1972 (A109-110), months after the preferred stock was issued.

3. In Point III Appellants argue that the banks were participants in the issuance of the false prospectus and should be subordinated. As with their Point II, this afterthought was not argued below and should not be available here. Moreover, it is certainly a desperate suggestion to argue to this Court that Homex's commercial bankers perpetrated the fraud when they were actually among its principal victims. As observed in U.S. v. David Stirling, et al, ___ F.2d ___, decided February 2, 1978: "the most blatant misrepresentation in the entire Homex drama [was] the Greater Gulf project" which involved the forging by Homex

personnel of an FHA commitment letter (p. 1449):

"The forged commitment letter was kept by Yanowitch and used to the benefit of Homex on three important occasions. First, it was used to 'assist' Dr. Mauriello in arriving at an opinion regarding the propriety of recognizing income from the Greater Gulf transaction. Second, it was shown to Homex's commercial bankers. Third, it was shown to Peat Marwick on March 19, 1971, to 'aid' them in their audit of the financial records for purposes of the approaching issuance." (Emphasis added.) (P. 1421.)

For all the foregoing reasons, the order should be affirmed.

Dated: February 10, 1978

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Consolidated Appeals:
77-5019, 77-5022

In the Matter of
STIRLING HOMEX CORPORATION,

Debtor

AFFIDAVIT OF
SERVICE BY MAIL

STATE OF NEW YORK)
 : SS.:
COUNTY OF ERIE)

ELVA A. RATHMANN, being duly sworn, deposes and says:
Deponent is not a party to the action, is over 18 years of age
and resides at 79 Marine Drive, in the City of Buffalo, County
of Erie and State of New York.

That on February 10, 1978, deponent served two copies
of the Brief for Appellees Marine Midland Bank and Lincoln First
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those being the addresses designated by said attorneys for
that purpose by depositing two true copies of same enclosed
in a postpaid properly addressed wrapper, in an official
depository under the exclusive care and custody of the
United States Postal Service within the State of New York.

Eloa A. Rathmann

Sworn to before me this
10th day of February, 1978.

Suzanne L. Olson
Notary Public

SUZANNE L. OLSON
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1978